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MISCELLANEOUS:

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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1149

THE FIRST NATIONAL BANK AND TRUST COMPANY,
CHICKASHA, OKLAHOMA,
Petitioner,

VERSUS

THE CONTINENTAL INSURANCE COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

QUESTIONS PRESENTED

The Respondent would agree with the contention of the Petitioner that the only question properly presented to the Supreme Court of the United States by virtue of this Petition for Writ of Certiorari is the question of whether the United States Court of Appeals, Tenth Circuit, properly exercised its appellate function under Rule 52(a) of the Federal Rules of Civil Procedure, which specifies that the findings of fact made by a District Court, sitting without a jury, are not to be set aside unless clearly erroneous.

STATEMENT OF CASE

For the purposes of the Petition for Writ of Certiorari to the United States Court of Appeals, Tenth Circuit, the Respondent, the Continental Insurance Company, accepts the statement of case as set out by the Petitioner in the Petition for Writ of Certiorari.

REASONS RELIED ON IN OPPOSITION OF WRIT

1. THE APPLICATION OF AN INSURANCE CONTRACT TO AN UNCONTROVERTED SET OF FACTS BY THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, WAS A PROPER EXERCISE OF THE APPELLATE FUNCTION OF THAT COURT.

Where, as in this case, the facts give rise to the necessity for construction of an insurance policy, the Federal Courts applying Oklahoma law have consistently held that the interpretation of an insurance policy, like any other contract, is a question of law for the Court. See *Gulf Insurance Company* v. *Gold Cross Ambulance Service Co.*, 327 F.Supp. 149; *Western Casualty and Surety Company* v. *Pacific Employees Insurance Company*, 97 F.Supp. 956. Thus, it is the Respondent's position that, having determined the facts and circumstances of the transaction in question, the District Court was then faced wtih the problem of construction of the insurance policy to determine whether those facts gave rise to coverage or exclusion of coverage under the policy. In the light of the *Gulf Insurance* and the *Western Casualty* cases, cited above, it seems clear that the judicial determination of those questions is a determination of law and not of fact.

In further support of this position, the Respondent would show the Court that the trial court found, as a conclusion of law, that "loss occasioned as a result of a check kiting scheme is a covered loss within coverage (B) of Bankers Blanket Bond Form No. 24, and money so obtained is not a loan within the meaning of the Loan-Loss Exclusion of said Bond." Thus, the trial court indicated that its finding, *i.e.*, that the loss sustained by the Petitioner, the First National Bank and Trust Company, Chickasha, Oklahoma, was not within the exclusion of the Bankers Blanket Bond, is a conclusion of law and not a conclusion of fact as the Petitioner urges.

In the Petition for Writ of Certiorari filed herein, the Petitioner urges that, "whether a transaction constitutes a loan of money is a question of fact, not of form." In support of this position, the Petitioner cites the Oklahoma case of *Cobb* v. *Baxter*, 292 P.2d 389 (Okla. 1956). The Respondent would respectfully show the Court that, in the cited case, the Oklahoma Supreme Court considered the question of the existence of a loan for an entirely different purpose than the question which is presented here. The *Cobb* decision concerned the question of whether or not a specific transaction violated the Oklahoma statute prohibiting usury. That statute applied only to loans of money, and has since been repealed. In the *Cobb* case, a seller of goods had attempted to conceal his usurious interest charges behind the facade of a conditional sales contract calling for installment payments and carrying charges. Thus, the Oklahoma Supreme Court was faced with the question of whether or not the transaction was a "loan of money" within the mean-

ing of the usury statute where the transaction was clearly designed to appear to be other than a loan.

In answer to the question presented by the facts of the *Cobb* case, the Oklahoma Supreme Court did, indeed, hold that the question of whether a transaction constitutes a loan of money is a question of fact and not of form. However, nowhere in that case, and in no case which comes to the Respondent's hand, did the Oklahoma Supreme Court hold that whether a transaction constitutes a loan of money is always a question of fact for the jury. That Court has merely held that whether or not a transaction is a loan of money must be determined by a close examination of the facts and circumstances surrounding the transaction, and not by a mere review of the form of the transaction.

Further, at the trial of this matter, extensive documentary evidence was introduced concerning the various transactions which occurred between the Francis Brothers and both the First National Bank of Chickasha, and the First National Bank of Blanchard. As a result of this extensive documentation, the evidence was virtually uncontroverted as to the circumstances surrounding those transactions. The Federal Courts, again construing Oklahoma law, have held that where there was no material conflict of introduced evidence as to factual occurrences, question of law was presented as to contractual construction. *Sweeney and Myers* v. *Empire State Insurance Company of Watertown, New York*, 130 F.Supp. 729, *rev.* 228 F.2d 770. This is plainly the situation in the case now at bar. The trial court made extensive findings of fact, most or all of which were based on evidence which was uncontroverted at trial. Having made those conclusions of fact, the trial

court then proceeded to determine, as a matter of law, the coverages and exclusions of the Bankers Blanket Bond which applied to the loss. The United States Court of Appeals, Tenth Circuit, relying on the same findings of fact, reached an entirely different conclusion of law. The Petitioners argue that in doing so, the United States Court of Appeals, Tenth Circuit, did not properly exercise its appellate function. The Respondent believes, and urges this Court to the view, that the Court of Appeals for the Tenth Circuit did no more than reverse the trial court's conclusions of law, and therefore, properly exercised its appellate function.

2. THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, IS SUPPORTED IN THE RECORD.

No more than a review of the trial court's findings of fact is required to support the conclusion of the Court of Appeals for the Tenth Circuit. The uncontroverted evidence was that an auto dealership operated by the brothers, Rene and Herald Francis was financed by the Petitioner bank; that on June 29, 1971, the Petitioners discovered a scheme involving the Francis brothers' checking account with the Petitioner and the First State Bank of Blanchard, as well as other types of loan frauds. Since the Petitioner presents no argument that the Court of Appeals erred in reversing the trial court as to its application of the Loan Loss Exclusion to the frauds not involving the checking account, it is assumed they concur with the correctness of that ruling. The only issue presented in their petition involves the loss which arose in connection with the checking account. The relevant Finding of Fact No. 14 of the trial court reads, in part: "The

Plaintiff's bank then determined, rather than to show an immediate overdraft on the account and an immediate loss on the transaction, and for the further purpose of protecting capital structure of the bank and aiding it in recovery, if in fact it were later determined that the Francis brothers' representations were not true and that there was in fact a loss, Plaintiff had the Francis brothers sign a note in the amount of $88,760.50, which, at that time, appeared to be the total amount of potential loss to the bank. The Francis brothers also signed a letter agreeing to furnish mortgages on all of the property that they owned, including their homestead. Plaintiff bank then deposited the sum of $88,-760.50, in the Francis brothers' account, charged the checks returned by Robert Gilmore against the account and paid the thirteen (13) checks which had been drawn on the account. Plaintiff was further permitted by the officers of the Blanchard bank to draw a draft on the collected balance of the Francis account in the Blanchard bank and this collected balance of $6,881.16 was deposited to the Francis account in Plaintiff bank. Payment of the thirteen (13) checks was made on the first day of July, 1971, and subsequently the checks which had been negotiated by Francis at First National Bank on June 29, 1971, and which had been drawn on their account in the Blanchard bank were returned through regular banking channels unpaid for insufficient funds. These checks totaled $34,373.21 and the Francis brothers were requested to sign a note in the amount of $33,302.22 for the same reasons and purposes as the previous note signed June 30, 1971."

Thus, the trial court found that an advancement of money, secured by a note, was made to the Francis brothers

after the bank learned of the overdrawn state of the Francis account. The trial court refused to characterize the resulting loss as an excluded loan loss. The Court of Appeals for the Tenth Circuit disagreed. Since there was no controversy as to what happened after the overdraft was discovered, the characterization of the transaction was a pure question of law. The Court of Appeals not only had the right to review this issue, but was compelled to do so since the ruling of the trial court was contrary to the uncontroverted evidence.

The Respondent would further show the Court that the trial court gave considerable weight to the elements of fraud involved in the transactions between the Francis brothers and the Petitioner. In following this logic, the trial court found that the bank's loans to the Francis brothers were not really loans because of the fraudulent intent of the Francis brothers. The trial court found, in Conclusion of Law No. 3, "there is no doubt in my mind that the Francis brothers had a deliberately devised scheme and plan to defraud the Plaintiff Bank as is described in Finding No. 16 but assuming arguendo that there was no overall scheme to defraud the Bank by means of the check kiting operation, Plaintiff would still be entitled to judgment against the Defendant Bonding Company in the amount of checks drawn on First State Bank of Blanchard and presented to Plaintiff as a loss occasioned when the Francis brothers obtained money from Plaintiff by false pretenses by means of false and bogus checks." The trial court found in Finding of Fact No. 19, "the Bankers Blanket Bond Standard Form No. 24 in question, contains an exclusion, excluding:

> " 'Any loss as the result of the complete or partial non-payment of or default upon any loan made by or obtained from the insured, whether procured in good faith or through trick, artifice, fraud or false pretenses, except when covered by insuring clause (A) (D) or (E).' "

The clear and unambiguous import of this language is that even though procured by reason of fraud or false pretense, as in this case, a loan loss is specifically excluded from the coverage of the insurance policy. Thus, the "deliberately devised scheme and plan to defraud the Plaintiff Bank" becomes immaterial to the coverage of the policy under circumstances where the scheme culminates in a loan transaction.

It cannot be said that the Petitioner Bank merely altered the form of the loss from a check kite to a loan loss by taking notes and pledges of collateral. The Petitioner, after having become fully aware of the Francis brothers' overdrawn status of their account, and relying upon the Francis brothers' own protestations of the legitimacy of their operations, concluded to make cash advancements in the amount of over $120,000.00 to the Francis brothers by means of depositing the cash in the Francis brothers' checking account with the Petitioner Bank. Had the Petitioner determined at that time to return the Francis brothers' checks, dishonored by reason of insufficient funds, to the First State Bank of Blanchard, the Petitioner Bank *might* have suffered the loss for which insurance coverage is herein claimed but for only half the amount claimed. The loss was occasioned not by the Francis brothers' check kiting scheme, but by the Petitioner's decision to advance money

to the Francis brothers on notes and a promise to give collateral which was dishonored.

Finally, citing *Bank of Southwest* v. *National Surety*, 477 F.2d 73 (5th Cir. 1973); *Maryland Casualty Company* v. *State Bank and Trust Company*, 425 F.2d 979 (5th Cir. 1970); *East Gadsden Bank* v. *U. S. Fidelity and Guaranty Company*, 415 F.2d 357 (5th Cir. 1969); *State Bank of Poplar Bluff* v. *Maryland Casualty Company*, 289 F.2d 544 (8th Cir. 1961), the United States Court of Appeals, Tenth Circuit, concluded that "as indicated, the exclusion provides that the Bond does not cover any loss which results from complete or partial non-payment of any loan made by the Insured, 'whether procured in good faith, or through trick, artifice, fraud or false pretenses.' In short, the exclusion fits the facts of the instant case most precisely, i.e., a loan procured through fraud and deceit." The Respondent would respectfully urge this Court, in the light of all the facts, that this conclusion, reached by the Court of Appeals for the Tenth Circuit, after careful consideration of the circumstances of this case, is inescapable.

CONCLUSION

Rule 19 of the Rules of the Supreme Court of the United States reads, in pertinent part, that a Writ of Certiorari to a United States Court of Appeals should be granted where that Court "has so far departed from the accepted and unusual course of judicial proceedings, or so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision." In the instant case, the Petitioner has made no such showing of such a radical departure from the accepted standards of

Appellate procedure. The United States Court of Appeals, Tenth Circuit, proceeded in a manner which was well within the scope of Appellate review permitted by Rule 52(a), Federal Rules of Civil Procedure. That Court ruled that the judicial construction placed upon the Contract of Insurance in the instant case by the trial court was clearly erroneous, and necessitated reversal of the decision below. The Appellate Court made no finding of facts. Neither did the Appellate Court challenge the trial court's decision as to the weight and credibility of the evidence. Rather, the Appellate Court carefully reviewed the Findings of Fact as made by the trial court and determined that, as a matter of law, those facts compel a result contrary to that reached at trial.

For the foregoing reasons, the Respondent prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

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March, 1975

CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief in Opposition to Petition for Writ of Certiorari has been served on Counsel for Petitioner this _____ day of April, 1975, by mailing three copies, postage fully paid, to:

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_____
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